BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

NYPPEX, LLC, and Laurence Allen

For Review of Action Taken by

FINRA

Administrative Proceeding No. 3-21933

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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I. INTRODUCTION

Applicants Laurence Allen and NYPPEX, LLC, the broker-dealer that Allen founded, appeal the sanctions the National Adjudicatory Council ("NAC") imposed for their violations of FINRA's By-Laws and rules. The NAC found (1) that Allen associated with NYPPEX for more than one year while he was subject to a statutory disqualification, and that NYPPEX allowed him to do so; (2) that Allen and NYPPEX published a press release that improperly implied FINRA's endorsement of NYPPEX's business practices; and (3) that Allen and NYPPEX failed to respond completely to requests for documents and information issued to them pursuant to FINRA Rule 8210. Consistent with the FINRA Sanction Guidelines, the NAC barred Allen and suspended NYPPEX for one year for their violations of FINRA Rule 8210; fined NYPPEX $40,000 for allowing Allen to associate with the firm while he was subject to a statutory disqualification; and fined NYPPEX $10,000 for implying in a press release that FINRA had endorsed the firm's business practices.[1] The record fully supports the NAC's findings of violation and the sanctions it imposed.[2]

Allen became subject to a statutory disqualification when a New York state court entered an injunction against him in December 2018. The state's attorney general applied for the injunction under the state's securities fraud statute. At the time, the attorney general was investigating suspected misconduct by Allen in connection with his management of a private investment fund. At the attorney general's request, the court entered an order that enjoined Allen

[1] Because the NAC barred Allen for his FINRA Rule 8210 violation, it did not impose sanctions on him for any other violation.

[2] When Applicants filed their brief in support of their application for review, they filed a motion to submit additional evidence. The additional evidence is a declaration from Allen with several documents attached to it. On August 9, 2024, FINRA opposed the motion. The Commission has not yet ruled on it. Unless otherwise indicated, references to the record in this brief refer to the certified record FINRA filed with the Commission.

from violating the state's securities fraud statute, among other things. Despite the injunction, NYPPEX allowed Allen to continue to associate with the firm, as its managing member, for more than one year without filing a Membership Continuance Application (MC-400).

In early 2020, in response to a civil lawsuit the attorney general had filed in December 2019, Allen and NYPPEX published a press release that implied FINRA's endorsement of NYPPEX's business practices. Attempting to rebut the allegations in the lawsuit, the press release stated that, during its recent examination, FINRA "did not find any violation of applicable securities regulations to warrant a fine, censure, or disciplinary action" of NYPPEX.

Around this time, due to concerns about the attorney general's allegations, FINRA opened an investigation into Allen's ongoing management of NYPPEX. In February 2020, FINRA staff issued to Allen and NYPPEX several requests for documents and information pursuant to FINRA Rule 8210. Among other things, the requests asked Allen and NYPPEX to provide two years of monthly statements for their corporate and personal bank accounts, information related to Allen's outside business activities ("OBAs") and private securities transactions ("PSTs") and NYPPEX's supervision of them, and information about loans between Allen and NYPPEX or any other entity Allen controlled. Allen and NYPPEX failed to provide all the documents and information requested by FINRA staff.

On appeal, Applicants do not directly challenge the NAC's findings of violation arising from this conduct, but instead focus on the sanctions the NAC imposed for their violations of FINRA Rule 8210. Applicants' arguments have no merit and the Commission should reject them. Applicants contend that Allen should not be barred for violating FINRA Rule 8210 because he substantially complied with FINRA's requests, but the record shows that is untrue. In fact, Allen provided less than 20 percent of the monthly bank account statements sought by

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FINRA staff, and failed to provide much of the information related to loans between himself and NYPPEX or other entities he controlled. Applicants contend that barring Allen and suspending NYPPEX will impose an undue burden on competition, but they cite no evidence to support their claim. And Applicants contend that barring Allen and suspending NYPPEX will not protect investors because NYPPEX operates as a private secondary market for qualified investors, but they cite no authority holding that firms or individuals who serve the private secondary market do not need to comply with FINRA Rule 8210 and should not be sanctioned for violating it.

The Commission should sustain the NAC's decision in all respects and dismiss the application for review.

II. FACTUAL BACKGROUND

A. Applicants and Other Relevant Persons and Entities

Allen first registered with FINRA in 1982. RP 401.[3] During the relevant period, 2018 to 2021, Allen was registered through NYPPEX as a general securities representative, general securities principal, investment banking representative, investment banking principal, and operations professional. RP 401.

NYPPEX was a broker-dealer whose business focused on the secondary market for private equity funds. RP 400. Allen founded NYPPEX in 1999 and was its managing member

[3] "RP" refers to the page number in the certified record filed by FINRA.

during the relevant period. RP 958. NYPPEX had one office, located in Rye Brook, New York, and had 10 or fewer registered representatives. RP 401.[4]

Michael Schunk first registered with FINRA in 1981. RP 401. During the relevant period, Schunk was registered through NYPPEX as a general securities representative and a general securities principal, and he served as the firm's chief executive officer and chief compliance officer ("CCO"). RP 401. Schunk was Allen's supervisor. RP 401.

NYPPEX Holdings, LLC ("NYPPEX Holdings"), is NYPPEX's corporate parent. NYPPEX Holdings describes itself as a financial technology firm focused on providing liquidity and risk analytic services and products to participants in the alternative asset class. RP 959. During the relevant period, Allen was the managing member of NYPPEX Holdings, and Schunk served as its CCO. RP 960, 2485.

B. The Attorney General Obtains an Injunction Against Allen

In December 2018, during an investigation into Allen's management of a private investment fund (the "Fund"), the Attorney General of New York (the "AG") applied to a New York state court for an ex parte order pursuant to Section 354 of New York's General Business Law. RP 402, 6041. Section 354 is part of the Martin Act, New York's "blue sky" law, which "authorizes the [AG] to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 2011 962 N.E.2d 765, 768 (N.Y. 2011). Section 354 empowers the AG, before filing a complaint, to obtain an order compelling testimony and the production of documents.

[4] Neither Allen nor NYPPEX is registered with FINRA currently. According to the Central Registration Depository ("CRD®"), their registrations terminated in December 2022. The Commission may take judicial notice of this information. *See James Lee Goldberg*, Exchange Act Release No. 66549, 2012 SEC LEXIS 762, at *3 n.2 (Mar. 9, 2012 (taking official notice of information in CRD®).

See N.Y. Gen. Bus. Law § 354. Upon application by the AG, the court must issue the order, along "with such preliminary injunction or stay as may appear" to the court "to be proper and expedient[.]" *Id.* The court may issue a Section 354 order ex parte, i.e., without first providing the respondent with notice and an opportunity for hearing. *See* N.Y. Civ. P. Law & R. § 6313. When the court does so, the respondent may move at any time to vacate or modify the order. *See Matter of James v. iFinex Inc.*, 2019 NY Misc. LEXIS 2484, at *2 (N.Y. Sup. Ct. May 16, 2019); N.Y. Civ. P. Law & R. § 6314.

On December 28, 2018, the court granted the AG's application and entered an order (the "Order") ex parte against Allen, NYPPEX Holdings, the Fund, and certain other entities. RP 403, 6041.[5] The Order required Allen to appear for testimony and to produce certain documents, books, and records. RP 6043-44. The Order also "preliminarily restrained" Allen "from violating [the Martin Act], and from engaging in fraudulent, deceptive and illegal acts," and "further restrained and enjoined" Allen "from employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise, including but not limited to . . . [f]acilitating, allowing, or participating in, the purchase, sale or transfer of any limited partnership interest in [the Fund]." RP 6044-45. Allen and Schunk, Allen's supervisor at NYPPEX, became aware of the Order no later than January 2019. RP 403.

On January 24, 2019, Allen disclosed the Order in an amendment to his Uniform Application for Securities Industry Registration or Transfer (Form U4). RP 5969. In response to Item 14H(1)(a) on Form U4, which asked whether any court had ever "*enjoined* you in

[5] Applicants stipulated that the Order was entered on December 28, 2018. RP 403. Applicants incorrectly state that the Order was entered on January 2, 2019, and assert that the NAC erred by "commenc[ing] the SD period before any order was entered[.]" Applicants' Brief at 8. In any event, a difference of five days is immaterial to the NAC's undisputed finding that Allen associated with NYPPEX for more than year without filing an MC-400 application.

connection with any *investment-related* activity," Allen checked the box, "Yes." RP 5979. In the "Civil Judicial DRP" section of Form U4, Allen disclosed that the AG had initiated a "court action" in state court seeking a "temporary restraining order." RP 5983. Allen further wrote that the AG had "applied for a court order for pre-litigation discovery and an ex parte preliminary injunction against a private equity investment fund of which I am the managing principal." RP 5984.

NYPPEX and Schunk allowed Allen to continue associating with the firm for more than one year before filing an MC-400. RP 6181.[6]

C. Allen and NYPPEX Solicit Investors for a Private Placement

A few weeks after the court entered the Order, in March 2019, Allen and registered representatives at NYPPEX began soliciting investors for a potential private placement of NYPPEX Holdings securities. RP 405. Allen and NYPPEX created and provided to investors several communications describing the terms of the private placement and requesting indications of interest. RP 405-08. According to Allen, the offering did not go forward due to a lack of investor interest. RP 1597.

D. Allen and NYPPEX Publish the Press Release

In December 2019, the AG filed a civil complaint in New York state court against Allen, NYPPEX Holdings, and several other entities, related to Allen's management of the Fund. RP 409, 6047. The complaint asserted five causes of action, including securities fraud and breach of fiduciary duty. RP 409, 6048. Among other things, the AG alleged that, over several years, Allen improperly caused the Fund to distribute $3.4 million in carried interest to the Fund's

[6] NYPPEX filed an MC-400 in February 2020, after the AG obtained a new preliminary injunction against Allen. RP 6130, 6182.

general partner, which Allen controlled, and "additional entities under [Allen's] control," including NYPPEX. RP 6086-87. The AG also alleged that Allen, over several years, had misappropriated more than $2.5 million from the Fund to pay NYPPEX Holdings' operating expenses. RP 6087-89. The AG asked the court to enter a preliminary injunction against Allen, NYPPEX Holdings, and the other defendants.[7] RP 6129.

Around this time, Allen began drafting a press release in response to the AG's allegations (the "Press Release"). RP 5145. At some point on or before January 2, 2020, the Press Release was posted to the internet. RP 7655. The Press Release was more than three pages long and it broadly criticized the AG's allegations while denying liability. RP 7655-59. Included in the Press Release were the following statements:

> On April 30, 2019, FINRA concluded its latest-year long examination of NYPPEX and its Affiliates. . . .
>
> In conclusion, FINRA did not find any violation of applicable securities regulations to warrant a fine, censure, or disciplinary action of the Company. The [AG's] allegations are in conflict with the facts concluded by FINRA. . . .
>
> Operating expenses have been properly and consistently allocated for years among Affiliates according to the Company's Affiliate Service Agreement (the "ASA"), which is required by FINRA.
>
> The ASA has been reviewed and approved by FINRA throughout its periodic examinations of the Company for over 15 years.[8]

RP 7655-57.

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[7] The requested preliminary injunction would replace the Order.

[8] An affiliate service agreement, or ASA, is an agreement between affiliates that provides for the allocation of shared expenses.

E. The New York Court Grants a Preliminary Injunction and NYPPEX Files an MC-400

On February 4, 2020, after a five-day evidentiary hearing, the state court granted the AG's motion for a preliminary injunction against Allen, NYPPEX Holdings, and several other entities that Allen controlled. RP 6130. The preliminary injunction restrained Allen and the other defendants from "[v]iolating Article 23-A of [New York's General Business Law], and from engaging in fraudulent, deceptive and illegal acts." RP 6133-34. The injunction further restrained and enjoined them "from employing any device, scheme or artifice to defraud or to obtain money by means of false pretense, representation or promise." *Id.* It also restrained Allen and the other defendants from "converting, transferring, selling or otherwise disposing of funds and assets held by [Allen's investment advisor], [the Fund], and [the Fund's general partner.]" *Id.*

A few days later, on February 13, 2020, FINRA staff emailed to NYPPEX a letter, pursuant to FINRA Rule 9522, informing the firm that Allen was statutorily disqualified. RP 6177-78. The letter stated that the disqualification arose from the preliminary injunction the court entered on February 4, 2020. RP 6178. The next day, NYPPEX submitted an MC-400 seeking FINRA's permission to remain associated with Allen.[9] RP 6181.

F. FINRA Opens an Investigation

Around this time, considering the AG's allegations against Allen, FINRA's Department of Member Supervision ("Member Supervision") opened an investigation. RP 3574. Among other things, Member Supervision was concerned about NYPPEX's relationship with the

[9] Applicants' brief discusses a purported meeting and conference call in March 2020 between Applicants and FINRA staff regarding Allen's statutory disqualification. *See* Applicants' Brief at 3, 8. Applicants cite no record evidence to support their assertions about the meeting or call.

numerous entities that Allen controlled, including Allen's and NYPPEX's involvement in the contemplated offering of NYPPEX Holdings securities. RP 3576-77.

1. FINRA Staff Issues the February 10 Request

On February 10, 2020, FINRA staff sent a letter to NYPPEX and Allen pursuant to FINRA Rule 8210 (the "February 10 Request"). RP 414, 7707. The letter asked NYPPEX to produce certain documents and information and stated that, to the extent any of the requested documents and information were in Allen's possession, custody, or control, Allen was required to provide them. RP 7707. The following items in the February 10 Request are relevant to the NAC's findings of violation:

- Item 1. Copies of "all account statements for all bank accounts" in the name of NYPPEX Holdings from January 1, 2018, to December 31, 2019. RP 7707.
- Item 2. Account statements for "all bank accounts in the name of Laurence Allen and/or for which Laurence Allen had signatory authority at any point" between January 1, 2018, and December 31, 2019. RP 7707.
- Item 8. "A current listing of all approved Outside Business Activities ('OBAs') and Private Securities Transactions ('PSTs') for Laurence Allen, and all evidence of approval and supervision of Mr. Allen's OBAs and PSTs" between January 1, 2018, and December 31, 2019. RP 7708.

The February 10 Request set a response deadline of February 24, 2020. RP 7707. On February 24, 2020, FINRA staff extended the deadline to March 2, 2020, at Allen's request. RP 7715.

2. FINRA Staff Issues the February 20 Request

On February 20, 2020, FINRA staff sent another letter to NYPPEX and Allen pursuant to FINRA Rule 8210 (the "February 20 Request"). RP 7711. The letter asked NYPPEX to produce certain documents and information and stated that, to the extent the requested documents and information were in Allen's possession, custody, or control, Allen was required to provide them. RP 7711. The following item is relevant to the NAC's findings of violation:

- Item 1. "For the period of January 1, 2019 to date provide a listing of all loans made from Allen to the firm, NYPPEX Holdings, LLC ('Holdings'), or any other company in which Allen has any ownership interest; and all loans made to Allen from the firm, Holdings, or any other company in which Allen has any ownership interest. Additionally, for all loans listed please provide the loan agreement, and other documentation and evidence of all payments." RP 7711.

The February 20 Request set a response deadline of February 27, 2020. RP 7711. As of March 13, 2020, Allen and NYPPEX had not provided complete responses to either the February 10 Request or the February 20 Request. RP 7729.

3. Allen and NYPPEX Fail to Comply Fully with the Requests

On March 13, 2020, an investigator in Member Supervision, David Steinberg, sent a second request to Allen's and NYPPEX's attorney, John Hewitt. RP 7729. Steinberg attached to his letter copies of the February 10 Request and the February 20 Request. RP 7731, 7735. Regarding the February 10 Request, Steinberg wrote that FINRA staff had not received, among other things, a response to Items 2 (Allen's bank statements) and 8 (a list of Allen's OBAs and PSTs and evidence of NYPPEX's approval and supervision of them). RP 7729. Regarding the February 20 Request, Steinberg wrote that FINRA staff had not received, among other things, a response to Item 1 (a list of loans between Allen and any entity in which he had an ownership interest and copies of the loan agreements). RP 7729. Steinberg wrote that the deadline for production had passed, and therefore Allen and NYPPEX were in violation of FINRA Rule 8210. RP 7729. The letter set a response deadline of March 20, 2020. RP 7729. On March 20, 2020, Hewitt and Steinberg spoke by telephone, and Steinberg extended the deadline until March 24, 2020. RP 7757.

On March 21, 2020, Hewitt sent an email to Steinberg containing some of the documents requested under Item 1 on the February 20 Request. RP 7759. Attached to the email were three different documents titled "Amended and Restated Credit Facility Agreements," and one

document titled, "Credit Facility Agreement." RP 7770-73. All three agreements related to loans made to NYPPEX Holdings by entities in which Allen had an ownership interest (Item 1 on February 20 Request). RP 7759, 7770-73.

On March 27, 2020, an attorney in FINRA's Department of Enforcement sent Hewitt an email stating that Allen and NYPPEX had not complied with the February 10 and 20 requests. RP 7789. The attorney wrote that FINRA was "still missing certain items, including Mr. Allen's bank statements." RP 7789.

On March 30, 2020, Steinberg sent Hewitt an email confirming the details of a telephone conversation they had earlier that day about deficiencies in Allen's and NYPPEX's responses to the February 10 Request and the February 20 Request. RP 7789. Steinberg wrote that "several items" from the February 10 and 20 Requests were still outstanding for NYPPEX and Allen. RP 7789. From the February 10 Request, Steinberg wrote that FINRA had not received, among other things, a response to Item 2 (Allen's bank statements). RP 7789. From the February 20 Request, Steinberg wrote that FINRA had "received documents but still require[d] a written response" from the firm for Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments). RP 7789. Steinberg wrote that if NYPPEX and Allen did not "complete the response to FINRA's requests" by April 6, 2020, "the firm and Allen may be subject to institution of a summary proceeding" that could result in suspension and "also could be the subject of formal disciplinary charges pursuant to FINRA Rule 8210." RP 7789.

On April 15, 2020, Steinberg sent Hewitt a third letter asking for outstanding documents requested in the February 10 Request and the February 20 Request. RP 7793. Steinberg attached to his letter copies of the February 10 Request and the February 20 Request. RP 7793.

Regarding the February 10 Request, Steinberg wrote that FINRA had not received, among other things, any documents for Item 2 (Allen's bank statements). RP 7794. Regarding the February 20 Request, Steinberg wrote that FINRA had not received, among other things, a complete response to Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments). RP 7794. Steinberg wrote that, "[a]s of today's date," Allen and NYPPEX "are both in violation of FINRA Rule 8210 for their failure to respond to multiple Rule 8210 requests[.]" RP 7793.

On April 21, 2020, Allen sent an email to an Enforcement attorney asking for an extension to respond to the various requests. RP 7823. Allen suggested an extension of time to April 24. RP 7823. The Enforcement attorney responded the next day by writing that FINRA "look[ed] forward to your production by April 24, 2020." RP 7823.

On April 24, 2020, NYPPEX provided a written response to Steinberg's April 15 letter, but did not produce additional documents. RP 7825. Regarding the February 10 Request, NYPPEX claimed that it already had provided, among other things, documents responsive to Items 1 (NYPPEX Holdings' bank statements) and 2 (Allen's bank statements). RP 7825. Regarding the February 20 Request, NYPPEX wrote that it had provided, among other things, documents responsive to Item 1 (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments), with "some documents still pending." RP 7827. NYPPEX wrote that, "[g]iven our progress in producing a substantial portion of documents," and the "highly unusual operating environment" due to COVID-19, the firm disagreed with the FINRA staff's view that Allen and the firm were in violation of FINRA Rule 8210. RP 7828.

On April 27, 2020, Steinberg emailed Allen and Schunk in response to NYPPEX's letter. RP 7831. Steinberg wrote that FINRA would provide a "detailed list of the items that remain outstanding" later that week. RP 7831. He also asked Allen to "provide the passwords for encrypted documents previously produced at your earliest convenience." RP 7831.

On May 1, 2020, Steinberg emailed Allen and Schunk again asking for passwords needed to access certain files. RP 7847. Allen responded that day, "Will do asap." RP 7847.

On May 7, Steinberg sent an email to Hewitt, copying Allen and Schunk. RP 7851. Steinberg wrote that several of the documents NYPPEX had produced previously were password protected, and FINRA staff needed the passwords. RP 7851.

Hewitt responded by email that he, Allen, and Schunk were "currently working on the production requests and anticipate providing the requested information in the designated time." RP 7851. Hewitt wrote that he would call Steinberg the next day "to ensure that we are properly coordinated on production." RP 7851.

On May 11, Steinberg sent an email to Hewitt that listed the password-protected documents that NYPPEX had provided. RP 7855. The list included several files that appeared to be related to Allen's bank statements and PSTs. RP 7855.

On May 12, Hewitt emailed Steinberg a letter, copying Allen and Schunk, which stated that NYPPEX had completed its production in response to the February 10 and February 20 Requests, but had not produced all the requested bank statements. RP 7858.[10] Hewitt wrote, "[a]dditionally, there are certain bank accounts maintained by" Allen "or in which he has signatory authority that have been requested" in the February 10 Request, and that Hewitt did not

[10] On May 6, 2020, Hewitt emailed a letter to Steinberg. RP 7851. The letter is not in the record.

believe they were "relevant in this matter." RP 7857. Hewitt wrote that "the Staff has agreed to make a discrete review of these accounts to determine their relevance in this matter. We are currently discussing with the Staff the arrangements for this review." RP 7857. Steinberg testified that he was not aware of any such discussions about any of Allen's bank statements. RP 3373-74.

Two weeks after that, on May 29, Steinberg sent an email to Hewitt, copying Allen and Schunk, in which he provided a list of "some of the most pressing items" that remained outstanding from the February 10 and 20 Requests and the April 10 Request. RP 7869. Regarding the February 10 Request, Steinberg wrote:

> Request #1 – NYPPEX Holdings bank statements for 2019
>
> Request #2 – Allen bank account statements, including accounts where he is a signatory (note that for the few accounts where statements have been produced, Mr. Allen failed to provide the password)
>
> Request # 8 – the response provided is password-protected and NYPPEX/Allen have failed to provide the password[11]

RP 7869.

Regarding the February 20 Request, Steinberg wrote:

> Request #1 – Some loan agreements have been produced, but we have not received a list of all loans and therefore do not know if we have received all loan agreements executed during the relevant time.

RP 7869.

That same day, Schunk sent an email to Hewitt, copying Allen, about the outstanding requests identified in Steinberg's email. RP 7871. Schunk wrote that he had NYPPEX Holdings' 2019 bank statements, but it "appears that they were not [uploaded] to Request

[11] Item 8 on the February 10 Request sought a list of Allen's OBAs and PSTs and evidence of approval and supervision of them for 2018 and 2019.

Manager along with the rest. I will [upload] them as soon as FINRA opens the 2-10-20 request which is currently closed." RP 7871.[12]

Regarding Items 2 (Allen's bank statements) and 8 (information about Allen's OBAs and PSTs) on the February 10 Request, Schunk wrote that they "require passwords," and that he "spoke to [Allen] and [Allen] will provide and copy you." RP 7871. Regarding Item 1 on the February 20 Request (a list of all loans between Allen and entities in which he had an interest, loan agreements, and evidence of payments), Schunk wrote that "it appears that they want a list [of loans] plus complete documentation including source of funds for each loan. The original request did not ask for source of funds." RP 7871.

There is no evidence in the record that Applicants provided any more documents or information to FINRA after this date. As of the hearing in this matter, Allen and NYPPEX had not provided:

- numerous monthly bank statements from 2018 and 2019 for six of Allen's personal bank accounts (RP 4969); any statements for six business-related bank accounts for which Allen was a signatory (RP 4970); or any statements for an unspecified number of additional bank accounts in Allen's name or for which he had signatory authority[13];

[12] When FINRA staff issues a request via the Request Manager system, a "window" is opened that allows the respondent to upload documents to the system. When the respondent indicates that the production is complete, which Schunk did on March 30, 2022, the window closes automatically. RP 3251-54. There is no evidence NYPPEX asked FINRA staff to re-open the window before or after Schunk's May 29 email. RP 3251-54.

[13] FINRA staff learned about the six personal bank accounts because Allen produced at least one statement for each of those accounts. *See* RP 3380-81. Allen did not provide any statements for the six business-related accounts or otherwise disclose them to FINRA. FINRA staff found out about them because the AG provided some statements for those accounts in response to an access request. RP 3381-82. It is not known how many other accounts Allen owned or for which he had signatory authority that he did not disclose to FINRA staff, but Hewitt stated that there were additional accounts that were not disclosed because Hewitt did not believe they were relevant. RP 7858.

- statements for any month in 2019 for five of NYPPEX Holdings' bank accounts (RP 4969);

- a list of Allen's PSTs and evidence of NYPPEX's approval and supervision of Allen's PSTs and OBAs (RP 3212-18);

- a list of all loans entered since January 1, 2019, between Allen and any entity in which he had an ownership interest, evidence of all payments made on such loans, and loan agreements for all such loans (RP 3221, 6686, 7770-73)[14];

- passwords for several password-protected documents provided to the FINRA staff. RP 4971.

III. PROCEDURAL HISTORY

In May 2021, Enforcement filed a nine-cause complaint against Allen, Schunk, and NYPPEX. *See* RP 1. Among other violations, Enforcement alleged that Allen associated with NYPPEX after he became subject to a statutory disqualification, and that NYPPEX allowed him to do so; that the Press Release implied FINRA's endorsement of NYPPEX's business practices; and that Allen and NYPPEX failed to provide complete responses to FINRA staff's requests for documents and information. RP 1-56.

An Extended Hearing Panel (the "Hearing Panel") held a 10-day hearing in March 2022. RP 1081-4945.[15] In August 2022, the Hearing Panel issued a decision finding Allen and NYPPEX liable for all nine violations alleged in the complaint. RP 8457. The Hearing Panel barred Allen and expelled NYPPEX for their failure to provide complete responses to FINRA

[14] According to NYPPEX's MC-400 application, Allen made two loans to NYPPEX holdings, one in 2019 for $125,000 and one in 2020 for $100,000. RP 6686. None of the four loan agreements Applicants produced match the descriptions of the loans in the MC-400. RP 7770-73.

[15] During the first day of the hearing, one of the hearing panelists withdrew. RP 9036. FINRA's Chief Hearing Officer appointed a new panelist, and the hearing began anew the next day. RP 9036-37.

staff's requests for documents and information. RP 8538-39. Considering the bar and expulsion, the Hearing Panel did not impose any additional sanctions on Allen or NYPPEX. RP 8538-39.

On appeal, the NAC modified the Hearing Panel's findings of violation and the sanctions. The NAC affirmed the Hearing Panel's finding that Allen associated with NYPPEX while statutorily disqualified, that the Press Release implied FINRA's endorsement of NYPPEX's business practices, and that Allen and NYPPEX failed to respond completely to the FINRA staff's requests for documents and information. RP 9080. The NAC affirmed the bar on Allen for his failure to provide all requested documents and information. RP 9080. Considering the bar, the NAC did not impose any sanctions on Allen for any other violation. RP 9080. The NAC vacated the expulsion imposed on NYPPEX for its failure to respond completely to FINRA staff's requests for documents and information and, instead, imposed a one-year suspension. RP 9080. For allowing Allen to associate with the firm while statutorily disqualified, the NAC fined NYPPEX $40,000. RP 9080. For implying FINRA's endorsement of its business practices in the Press Release, the NAC fined NYPPEX $10,000. RP 9080

IV. ARGUMENT

The Commission should sustain the NAC's decision in all respects. The evidence shows that Allen associated with NYPPEX while he was subject to a statutory disqualification, and that NYPPEX allowed him to do so. The evidence further shows that the Press Release improperly implied FINRA's endorsement of NYPPEX's business practices. And the evidence shows that Allen and NYPPEX failed to provide all the documents and information requested by FINRA staff, which were important to FINRA's investigation into the relationship between Allen, NYPPEX, and other entities controlled by Allen.

Applicants have not demonstrated that the sanctions the NAC imposed are excessive or oppressive. The Sanction Guidelines (the "Guidelines") fully support the bar imposed on Allen and the suspension and fines imposed on NYPPEX. These sanctions will serve to remediate Applicants' misconduct and protect investors.

A. Allen Associated with NYPPEX While Statutorily Disqualified, and NYPPEX Allowed Him to Do So

The NAC found, and Applicants do not dispute, that Allen associated with NYPPEX while statutorily disqualified, and that NYPPEX allowed him to do so, in violation of FINRA's By-Laws and rules. The Commission should sustain these findings. *See Eric S. Smith*, Exchange Act Release No. 100762, 2024 SEC LEXIS 1974, at *25 (Aug. 19, 2024) (finding that the applicant forfeited his right to challenge finding of violation by not briefing the issue but reviewing each element of the violation consistent with the standard of review); 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief . . . may, at the discretion of the Commission, be deemed to have been waived by the applicant.")

FINRA's By-Laws provide that "[n]o person shall become associated with a member [or] continue to be associated with a member . . . if such person . . . becomes subject to a disqualification under Section 4" of the By-Laws, and "no member shall be continued in membership, if any person associated with it is ineligible to be an associated person under this subsection." FINRA By-Laws, Art. III, Sec. 3(b). Section 4 of FINRA's By-Laws states that a person is subject to a disqualification if he is subject to any "statutory disqualification," as that term is defined in Section 3(a)(39) of the Securities Exchange Act of 1934 (the "Exchange Act"). FINRA By-Laws, Art. III, Sec. 4. Exchange Act Section 3(a)(39), in turn, provides that "[a] person is subject to a 'statutory disqualification'" if he "is enjoined from any action, conduct, or practice specified in" Exchange Act Section 15(b)(4)(C). 15 U.S.C. § 78c(a)(39)(F). Among the

actions, conduct, or practices specified in that section is any "conduct or practice in connection . . . with the purchase or sale of any security." 15 U.S.C. § 78o.

FINRA Rule 8311 provides that "a member shall not allow [a statutorily disqualified] person to be associated with it in any capacity that is inconsistent with the . . . disqualified status, including a clerical or ministerial capacity."

Allen became subject to a statutory disqualification when the New York court entered the Order in December 2018. The Order enjoined Allen from engaging in conduct specified in Exchange Act Section 15(b)(4)(C) because it enjoined him from violating the Martin Act, a securities fraud statute, and specifically enjoined him from undertaking activities in connection with the purchase or sale of securities, i.e., interests in the Fund. RP 6044-45.

Although the Order initially was entered ex parte, New York law provided Allen with an opportunity to be heard. Under New York law, as soon as Allen became aware of the Order, he could have moved immediately to vacate or modify it. *See* N.Y. Civ. P. Law & R. § 6314; *Matter of James v. iFinex Inc.*, 2019 N.Y. Misc. LEXIS 2484, at *8 (stating that a motion to vacate or modify an ex parte injunction allows the court "to take a fresh look . . . with the benefit of the facts and arguments presented by" the enjoined party).[16] Had Allen done so, he would

[16] The Commission should reject Applicants' collateral attack on the Order. *See* Applicants' Brief at 2-4. Allen waived his opportunity to challenge the Order before the New York court and should not be permitted to do so here. *See Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at *15 (June 22, 2018) ("[W]e have long held that principles of collateral estoppel dictate that a respondent must not be permitted to retry the merits of a proceeding that results in conviction or an injunction.").

have been heard on the merits.[17] There is no evidence in the record that Allen, who was represented by counsel in the AG's litigation, filed such a motion. Allen therefore waived his right to be heard. *See United States v. Batato*, 833 F.3d 413, 427 (4th Cir. 2016) ("The guarantees of due process do not mean that the defendant in every civil case must actually have a hearing on the merits. What the Constitution does require is an opportunity . . . . A party's failure to take advantage of that opportunity waives the right it secures.").[18]

While Applicants contend that they "immediately and properly" submitted an MC-400 in February 2020, it is undisputed that Allen and Schunk, Allen's supervisor at NYYPEX, became aware of the Order no later than January 2019. RP 403; Applicants' Brief at 3. Nevertheless, Allen continued to associate with NYPPEX, and NYPPEX allowed him to do so, for more than a year without filing an MC-400.

As a result of this conduct, NYPPEX violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rules 8311 and 2010, and Allen violated Article III, Section 3(b) of FINRA's By-Laws and FINRA Rule 2010. The Commission should sustain these findings of violation.

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[17] *See Bradford Audio Corp. v. Pious*, 392 F.2d 67, 72 (2d Cir. 1968) ("[I]t was not a violation of due process for the state court to enter an ex parte order . . . where the appellant was thereafter notified of subsequent proceedings in the case in which its interests in the property were to be determined after full opportunity to be heard."); *Gozelski v. Wyo. Cnty.*, 115 A.D.2d 1000, 1001 (N.Y. App. Div. 1985) ("The fact that the order was issued ex parte does not, by itself, deny plaintiff his property without due process of law. Plaintiff's recourse here was to move to modify or vacate the temporary restraining order.").

[18] This is consistent with the Commission's holding in *Nicholas J. Savva*, Exchange Act Release No. 724585, 2014 SEC LEXIS 5100, at *16-17 (June 26, 2014). ("[I]n the context of Exchange Act Section 15(b)(4)(H), the definition of 'final order' should be limited to those orders issued under statutory authority providing for notice and an opportunity for a hearing, in order to address fundamental fairness concerns.").

B. The Press Release Implied FINRA's Endorsement of NYPPEX's Business Practices

The NAC found, and Applicants do not dispute, that Allen and NYPPEX violated FINRA Rule 2210(e)(1) by publishing the Press Release because the Press Release implied FINRA's endorsement of NYPPEX's business practices. The Commission should sustain these findings. *See Eric S. Smith*, 2024 SEC LEXIS 1974, at *25; 17 C.F.R. § 201.420(c).

FINRA's By-Laws provide that "[n]o member shall use the name of the Corporation except to the extent that may be permitted by the Rules of the Corporation." FINRA By-Laws, Article XV. FINRA Rule 2210(e)(1) allows members to "indicate FINRA membership in conformity with" the By-Laws in a communication as long as the communication "neither states nor implies that FINRA, or any other corporate name or facility owned by FINRA, or any other regulatory organization endorses, indemnifies, or guarantees the member's business practices, selling methods, the class or type of securities offered, or any specific security[.]"

Allen and NYPPEX issued the Press Release in response to the AG's allegations in the civil lawsuit. Among other things, the AG alleged that Allen improperly caused the Fund to distribute $3.4 million in carried interest to the Fund's general partner and other entities. RP 6086-87. The AG also alleged that Allen misappropriated more than $2.5 million from the Fund to pay NYPPEX Holdings' operating expenses. RP 6087-89.

The Press Release attempted to rebut the AG's allegations by implying that, notwithstanding the AG's allegations of serious wrongdoing, FINRA had approved of NYPPEX's business practices during its examination of the firm. The Press Release stated that (1) following FINRA's 2018 examination of NYPPEX, FINRA "did not find any violation of the applicable securities regulations to warrant a fine, censure or disciplinary action of the Company," (RP 1235-36) and (2) "[t]he ASA has been reviewed and approved by FINRA

throughout its periodic examinations of the Company for over 15 years." RP 7657. These statements suggested that FINRA had reviewed and approved NYPPEX's business practices, generally, and its ASA, specifically. *See Pac. On-Line Trading & Secs., Inc.*, 56 S.E.C. 1111, 1119-20 (2003) (finding that the applicants' statement that a seminar provided "8 Hours of Professional Instruction, Supervised by NASD Series 24 Registered Principal" implied NASD's endorsement of the seminar).[19] Accordingly, the statements in the Press Release violated FINRA Rule 2210(e)(1). The Commission should sustain the NAC's finding of violation.

C. Allen and NYPPEX Failed to Respond Completely to Requests for Documents and Information

The NAC found, and Applicants do not dispute, that Allen and NYPPEX violated FINRA Rule 8210 because they failed to provide all the documents and information requested by FINRA staff in the February 10 and 20 Requests. The Commission should sustain these findings. *See Eric S. Smith*, 2024 SEC LEXIS 1974, at *25; 17 C.F.R. § 201.420(c).

FINRA Rule 8210 provides that FINRA may require a member, associated person, or other person subject to its jurisdiction to provide information in writing or electronically and to permit the inspection and copying of books and records. The language of FINRA Rule 8210 is unequivocal regarding a member's or associated person's responsibility to comply with FINRA's requests. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *39 (Sept. 24, 2015). Vigorous enforcement of the rule helps ensure the continued strength of the self-regulatory system, thereby enhancing the integrity of the securities markets and protecting investors. *See id.*

[19] "Endorse" means to "indicate approval or support." *See McCann v. Unum Provident*, 907 F.3d 130, 144 (3d Cir. 2018).

Applicants failed to provide all the NYPPEX Holdings' bank statements requested by FINRA staff. Item 1 on the February 10 Request asked Applicants to provide "all account statements in the name of [NYPPEX] and/or NYPPEX Holdings, LLC for the period of January 1, 2018 to December 31, 2019." RP 7707. NYPPEX Holdings had five bank accounts in 2019, and Applicants did not produce any 2019 monthly statements for those accounts. RP 4969.

Applicants failed to provide all of Allen's bank statements requested by FINRA staff. Item 2 in the February 10 Request asked Applicants to provide "all account statements for all bank accounts in the name of Laurence Allen and/or for which Laurence Allen had signatory authority at any point" in 2018 or 2019. RP 7707. Allen held at least six bank accounts in his name in 2018 and 2019. RP 4969. Applicants provided fewer than 40 of 144 of the requested monthly statements for these accounts. RP 4969. Allen also held at least six business-related accounts in 2018 and 2019. RP 4970. Applicants failed to provide any monthly statements for those accounts. RP 4970. Additionally, Allen held or had signatory authority on an unspecified number of other bank accounts, and Applicants failed to provide any monthly statements for those accounts.[20]

Applicants failed to provide all the information related to Allen's OBA's and PST's requested by FINRA staff. Item 8 in the February 10 Request asked Applicants to provide a "current listing of all approved Outside Business Activities ('OBAs') and Private Securities Transactions ('PSTs') for Laurence Allen, and all evidence of approval and supervision of Mr. Allen's OBAs and PSTs" between January 1, 2018, and December 31, 2019. RP 7708. Applicants failed to provide a list of Allen's PSTs or documents evidencing NYPPEX's approval and supervision of Allen's OBAs and PSTs. RP 3212-18.

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[20] *See supra* note 13.

Applicants failed to provide all the documents and information related to loans requested by FINRA staff. Item 1 on the February 20 Request asked Applicants to provide a list of all loans made since January 1, 2019, between Allen, NYPPEX, NYPPEX Holdings, or any other company in which Allen had an ownership interest, as well as the "the loan agreement, and other documentation and evidence of all payments." RP 7711. Applicants failed to provide (1) a list of the loans (RP 3221); (2) loan agreements for the two loans between Allen and NYPPEX Holdings in 2019 and 2020 (RP 6686, 7770-73)[21]; (3) three of four original loan agreements for loans that were modified after January 1, 2019 (RP 7770-73)[22]; (4) and evidence of all payments made on the loans (RP 3221).

Applicants also failed to provide passwords for several password-protected documents they provided to FINRA staff in response to the Rule 8210 requests. RP 4971.

Applicants failed to provide all the documents requested by FINRA staff pursuant to FINRA Rule 8210. The Commission should sustain the NAC's findings of violation.

D. The Sanctions the NAC Imposed Are Appropriately Remedial and Necessary for the Protection of Investors

Section 19(e)(2) of the Exchange Act provides that the Commission must sustain the sanctions the NAC imposed unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78(e)(2). To determine whether a sanction is excessive or oppressive, the Commission considers whether it serves a remedial purpose by protecting investors and the public interest. *John M.E. Saad*, Exchange Act Release No. 86751,

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21 *See supra* note 11.

22 Three of four loan agreements Applicants produced were "amended and restated." *See* RP 7770-73. Applicants did not produce the original loan agreements.

2019 SEC LEXIS 2216, at *10-11 (Aug. 23, 2019) (explaining that FINRA may impose sanctions for a remedial purpose), *aff'd*, 980 F.3d 103 (D.C. Cir. 2020). Although the Commission is not bound by the Guidelines, it uses them "as a benchmark in conducting [its] review under Exchange Act Section 19(e)(2)." *Robert Juan Escobio*, Exchange Act Release No. 97701, 2023 SEC LEXIS 1532, at *31 (June 12, 2023).

1. The Sanction for Allowing Allen to Associate with NYPPEX While Statutorily Disqualified Is Appropriately Remedial

The NAC fined NYPPEX $40,000 for allowing Allen to associate with the firm while he was statutorily disqualified.[23] RP 9073. This fine is within the range recommended in the Guidelines and is neither excessive nor oppressive.

As relevant to NYPPEX, for violations of Article III, Section 3 of FINRA's By-Laws, the Guidelines recommend a fine of $5,000 to $77,000.[24] In egregious cases, the Guidelines recommend suspending the firm with respect to any or all activities or functions for up to two years.[25] The principal considerations under the Guidelines are: (1) the nature and extent of the disqualified person's activities and responsibilities; (2) whether a Form MC-400 was pending; and (3) whether the disqualification resulted from financial and/or securities misconduct.[26]

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[23] The NAC assessed a $40,000 fine on Allen for this violation but did not impose it considering the bar that it imposed for his violation of FINRA Rule 8210. RP 9073. The Commission therefore should not review this fine. *See Bruce Zipper*, Exchange Act Release No. 100777, 2024 SEC LEXIS 1988, at *1 n.2 (Aug. 20, 2024) (stating that the Commission would not review sanctions the NAC did not impose on applicants).

[24] *See FINRA Sanction Guidelines*, at 43 (Oct. 2021), available at https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf (Oct. 2021).

[25] *Id.*

[26] *Id.*

The NAC identified several aggravating factors. First, as NYPPEX's managing member, Allen had significant responsibilities at the firm. *See* RP 9073. Second, Allen's statutory disqualification resulted from an injunction based on allegations of financial or securities-related misconduct. RP 9073. And third, NYPPEX allowed Allen to associate with the firm for more than a year after Allen became subject to a statutory disqualification. RP 9073.

In arriving at balanced sanctions for this misconduct, the NAC identified an important mitigating factor. The NAC found that Allen and NYPPEX, for some period in 2019, reasonably relied on advice of counsel that the Order did not disqualify Allen. *See* RP 9071. The NAC noted that whether an ex parte injunction like the Order triggered a statutory disqualification appeared to be an issue of first impression, and that there was documentary evidence showing that Allen and NYPPEX had consulted with attorneys frequently in the weeks after the court entered the Order. RP 9071. The NAC further noted that Allen amended his Form U4 to disclose the Order in January 2019, and that the FINRA staff did not issue a Notice of Disqualification pursuant to FINRA Rule 9522 in response to the disclosure. *See* RP 9071-72.

After considering the Guidelines and the aggravating and mitigating factors, as well as NYPPEX's small size, the NAC imposed on NYPPEX a $40,000 fine, which is in the middle of the recommended range. *See* RP 9073. This fine is appropriately remedial, and the Commission should sustain it.

2. The Sanction for Implying FINRA's Endorsement of NYPPEX's Business Practices Is Appropriately Remedial

The NAC imposed on NYPPEX a $10,000 fine for implying FINRA's endorsement of NYPPEX's business practices in the Press Release. RP 9073.[27] These sanctions are within the range recommended in the Guidelines and are not excessive nor oppressive.

For failing to comply with FINRA Rule 2210's standards, the Guidelines recommend a fine of $1,000 to $31,000.[28] The Guidelines instruct the adjudicator to consider whether the violative communication with the public was circulated widely.[29] The NAC found this factor mildly aggravating because the Press Release was publicly available on the internet, but there was no link to the Press Release on NYPPEX's homepage, and the only way a member of the public could access the Press Release was by entering its URL into an internet browser or using particular search terms. RP 9073. As a result, the NAC fined NYPPEX $10,000. This fine is appropriately remedial, and the Commission should sustain it.

3. The Sanctions for Applicants' Failures to Respond Completely to FINRA Staff's Requests Are Remedial

The NAC barred Allen and suspended NYPPEX for one year for their violations of FINRA Rule 8210. RP 9075, 9078.[30] These sanctions are within the range recommended in the Guidelines and are neither excessive nor oppressive.

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[27] The NAC assessed a $10,000 fine on Allen for this violation but did not impose it considering the bar that it imposed for his violation of FINRA Rule 8210. RP 9073. The Commission therefore should not review the fine. *See Bruce Zipper*, 2024 SEC LEXIS 1988, at *1 n.2.

[28] *Guidelines*, at 80.

[29] *Id.*

[30] The NAC sanctioned Allen and NYPPEX separately based on their respective responsibility for providing the documents and information at issue. *See* RP 9075.

FINRA Rule 8210 is the primary means by which FINRA obtains the information necessary to carry out its investigations and fulfill its regulatory mandate to ensure that members and its associated persons adhere to FINRA's rules. *Dep't of Enf't v. Jarkas*, Complaint No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46 (FINRA NAC Oct. 5, 2015), *aff'd*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285 (Apr. 1, 2016). The rule "is at the heart of the self-regulatory system for the securities industry and is an essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously enforced." *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *50-51 (Feb. 13, 2015). "A failure to fully respond to FINRA's Rule 8210 requests threatens the self-regulatory system and, in turn, investors by impeding FINRA's detection of violative conduct." *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, *49 (May 8, 2015), *aff'd*, 2016 U.S. App. LEXIS 24259 (6th Cir. June 29, 2016).

The Guidelines provide different recommendations for individuals and firms. For individuals who provide a partial but incomplete response to a request made pursuant to Rule 8210, the Guidelines state that a bar is standard, unless the respondent can demonstrate that the information provided substantially complied with all aspects of the request.[31] When mitigation exists, the Guidelines state that adjudicators should consider suspending the individual in any or all capacities for up to two years.[32] For firms that provide a partial but incomplete response to a request made pursuant to FINRA Rule 8210, the Guidelines state that the firm should be expelled in an egregious case.[33] When mitigation exists, the Guidelines state that adjudicators should

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31 *Guidelines*, at 33.

32 *Id.*

33 *Id.*

consider suspending the firm with respect to any or all activities or functions for up to two years.[34]

The Guidelines provide three violation-specific considerations in determining sanctions when an individual or firm has provided a partial but incomplete response to a FINRA Rule 8210 request, including: (1) the "[i]mportance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request;" (2) the "[n]umber of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response;" and (3) "[w]hether the respondent thoroughly explains valid reason(s) for the deficiencies in the response."[35]

a. A Bar Is Appropriate for Allen's Violation Because He Did Not Substantially Comply with the Requests

The NAC found that barring Allen was appropriate because he did not substantially comply with all aspects of the requests directed to him. RP 9075. Of the five categories of documents and information at issue, Allen had direct control over two: (1) his bank statements and (2) information about the loans between him and entities in which he had an ownership interest. Allen provided only a handful of the bank statements requested. Allen owned or had signatory authority on more than 12 bank accounts in 2018 and 2019. RP 4969-70. He therefore should have provided more than 288 monthly statements for these accounts. He provided less

34 *Id*.

35 *Id.*

than 20 percent of those statements. RP 4969.[36] He provided no statements for six specific bank accounts (RP 4970), and no statements for an unspecified number of other bank accounts.[37]

With respect to information about loans, Allen did not provide the list of loans that FINRA requested. RP 3221. Allen's refusal to provide this information made it impossible for FINRA staff to determine whether Allen had provided complete responses to the requests for all loan agreements and evidence of all loan payments made. Allen did not provide agreements for two loans he made to NYPPEX Holdings that were disclosed on NYPPEX's MC-400 (RP 6686, 7770-73), and Allen did not provide all the requested loan agreements for three loans that were modified after January 2019 (RP 7770-73). Allen also failed to provide evidence of all payments made on all loans. RP 3221.

Applicants assert that, in finding that Allen failed to substantially comply with all aspects of the requests, the NAC "ignored the factual context" and Applicants' "cumulative compliance." Applicants' Brief at 5-6. Applicants contend that the NAC failed to consider "the inception of Covid; the overlapping 8210 demands, the health problems then affecting Allen and [Schunk]; and the production made before and after the specific demands on which FINRA focuses." *Id.* at 5.

Applicants' assertions are not supported by the record.[38] FINRA staff recognized that Allen and NYPPEX were operating in a difficult environment and repeatedly granted extensions of time to respond to the requests for documents and information. In determining whether Allen

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[36] Allen provided three bank statements that were password protected. RP 4971. FINRA staff did not receive the passwords for these files. RP 4971. Even if Allen is credited with providing those statements, he still provided less than 20 percent of the statements requested.

[37] *See supra* note 13.

[38] Applicants cite no record evidence that Allen had health problems at the time.

substantially complied with all aspects of the requests, the NAC focused on the two categories of documents and information over which Allen had direct control—his bank statements and information related to loans between him and entities he controlled. As discussed above, Allen never produced numerous bank statements, never produced the list of loans, never produced all the loan agreements, and never produced evidence of all payments made on the loans. More than 15 months passed from February 2020, when FINRA staff issued its requests, to May 2021, when Enforcement filed its complaint. There is no evidence that COVID-19, other requests for documents and information, or health problems prevented Allen from providing the missing documents and information for the entirety of that period.

The violation-specific considerations also support a bar. The documents and information Allen failed to provide were important to FINRA. At the time of FINRA's requests, the AG had accused Allen and NYPPEX Holdings of engaging in illegal conduct, including securities fraud and breach of fiduciary duty, related to the Fund and other entities Allen controlled. FINRA staff was concerned that Allen and NYPPEX apparently had participated in a private placement of NYPPEX Holdings securities in early 2019, shortly after the New York court entered the Order. *See* RP 3365-66. FINRA staff requested Allen's bank statements to review the movement of money between the various entities Allen controlled in 2018 and 2019. RP 3363-64, 3414-15. With respect to the information about loans, FINRA staff asked for them because two loans between Allen and NYPPEX Holdings were disclosed on the MC-400 that NYPPEX had submitted in February 2020, and FINRA staff wanted to know about any other loans between Allen and entities in which he had an ownership interest. RP 3220-21.

FINRA applied a significant amount of regulatory pressure on Allen to obtain the information at issue. After sending the initial requests for Allen's bank statements on February

10 and the loan information on February 20, FINRA staff made several more specific requests for this information.

Allen did not offer a valid reason for not providing a complete response to the requests. He did not explain why he could not have obtained all his account statements, or why he could not have obtained the information about the loans to which he was a party.[39]

Applicants contend that the NAC "disregarded Allen's offers to produce" documents and information, and that Allen had a valid reason for not responding completely to FINRA staff's requests. Applicants' Brief at 5. Applicants assert, without any evidentiary support, that "certain bank accounts and loan documents that were related to a family trust, [Allen] did not have signatory authority or control and was not the sole beneficiary." Applicants Brief 5. According to Applicants, Allen's attorney offered to provide these documents and information to FINRA "through Web *access* or by hard copy subject to confidentiality," and "FINRA rejected these offers[.]" Applicants' Brief at 5.

There is no evidence to support Applicants' assertions that all the documents and information Allen did not provide were related to a family trust and Allen did not have signatory authority or control over them. FINRA staff requested, and the NAC found Allen liable for failing to provide, monthly statements for bank accounts in Allen's name or for which he had signatory authority. *See* RP 9067-68. The record shows that there were at least 12 such accounts, and that Allen did not provide all the statements requested for any of them. RP 4969-70. There were an unspecified number of other such accounts.[40] Applicants cite no evidence

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[39] *See id.* at *43 ("And for the information that Applicants claim they did not have, Applicants made no attempt to obtain it elsewhere or explain to FINRA why the information was not available.").

[40] *See supra* note 13.

that any of these accounts was related to a family trust. Similarly, FINRA staff requested, and the NAC found Allen liable for failing to provide, documents and information related to loans between Allen and entities he controlled. *See* RP 9068. The record shows that there were several such loans for which Allen did not produce all the information requested. Applicants cite no evidence that any of those loans was related to a family trust.[41]

Even if Allen had offered to provide certain responsive documents "through Web *access* or by hard copy subject to confidentiality," it would not be mitigating. Contrary to Applicants' assertion, an offer to allow FINRA staff to review, for a limited period, certain responsive documents via "web access" is not "arguably consistent" with FINRA Rule 8210. *See* Applicants' Brief at 5. FINRA Rule 8210 empowers FINRA staff to "inspect and copy" the books, records, and accounts of a member or associated person. Allowing FINRA staff to view, for a limited period, certain responsive documents via "web access" is not consistent with the rule because the staff cannot "inspect and copy" such records. Similarly, an offer to produce responsive documents in hard copy "subject to confidentiality" would not be mitigating because Applicants cannot set conditions for their compliance with FINRA Rule 8210. *See Escobio*, 2023 SEC LEXIS 1532, at *23 (stating that the Commission has "recognized that individuals . . . may not second-guess a Rule 8210 request or set conditions for their compliance with it"); *see also N. Woodward*, 2015 SEC LEXIS 1867, at *26 ("Because much of the information that FINRA needs to conduct its investigations is non-public and confidential, FINRA's ability to

[41] To the extent Allen could not provide responsive bank statements or loan information because an account or loan was related to a family trust, he could have provided a list of all such accounts or loans and provided documentation to FINRA showing why he could not provide the requested information. He did not.

police the activities of its members and associated persons would be eviscerated if FINRA could not request such information under Rule 8210.").

In addition to these factors, the NAC was troubled by Allen's disregard for his obligations under FINRA Rule 8210. When asked if he understood that Rule 8210 required him to respond to FINRA's requests truthfully and thoroughly, he replied: "My understanding of 8210 is that FINRA uses it to provide a record that's inaccurate so that, when you get to a hearing, they can accuse you of not providing documents. That's my new understanding of 8210." RP 1352. When asked if it was his "testimony before this hearing panel that you don't understand that FINRA Rule 8210 requires you to give truthful and accurate information to FINRA," he responded: "I'm not testifying one way or the other." RP 1352. He then said: "I'm not an expert at knowing what the rules are of FINRA. That's what I rely on our legal counsel for." RP 1352. The NAC concluded that Allen's cavalier attitude about his failure to comply with Rule 8210 raised grave concerns about the likelihood of future misconduct.[42]

Applicants argue that, despite his failure to comply with the requests and his non-remorseful posture at the hearing, Allen did not disregard his obligations under FINRA Rule 8210. Applicants' Brief at 6. Applicants contend that the "best evidence" of Allen's attitude toward his obligations under the rule is "his actual responses in real time to the 8210 demands," and that, "[f]or over thirty-six years," Allen has "never posed any 'danger' to the 'investing public[.]'" *Id.* But Allen's "real time" response to the requests was grossly deficient. Allen had more than 15 months to provide all the documents and information sought by FINRA staff. He

[42] *See PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, *28 (Apr. 11, 2008) ("Applicants' cavalier disregard of the need to ensure that PAZ and Mizrachi respond to requests for information in a timely fashion even while Mizrachi is out of the country poses a clear risk of future misconduct."), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

has never provided a valid reason for his failure to do so during that extended period. And Allen's purported history of not posing "any danger to the investing public" does not mitigate his noncompliance with these requests. *Phillipe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006) (stating that an applicant's lack of disciplinary history is not mitigating because an "associated person should not be rewarded for acting in accordance with his duties as a securities professional").

The Commission should affirm the NAC's imposition of a bar on Allen.

b. A One-Year Suspension Is Appropriate for NYPPEX's Serious Violation

The NAC found that suspending NYPPEX for one year was appropriate because the firm's violation of FINRA Rule 8210 was serious but not egregious. RP 9078. Of the five categories of documents and information that were not provided, NYPPEX had direct control over three of them: (1) NYPPEX Holdings' 2019 bank statements; (2) the list of Allen's PSTs and evidence of the firm's supervision of Allen's OBAs and PSTs; and (3) the password-protected files for which passwords were not provided.

The violation-specific considerations support the sanction the NAC imposed. The documents and information NYPPEX failed to provide were important to FINRA. At the time of the requests, Allen and NYPPEX Holdings had been accused of engaging in illegal, investment-related misconduct, and FINRA staff had concerns that Allen and NYPPEX apparently had participated in a private placement of NYPPEX Holdings securities. With respect to NYPPEX Holdings' bank statements, specifically, Steinberg testified that the staff wanted to "get the statements preceding and following the [the contemplated private placement] time period" to "get a full picture of the activity that occurred." RP 3209. With respect to the request for information about Allen's OBAs and PSTs, Steinberg testified that, given the allegations in the

AG's civil lawsuit, the staff had "concerns related to the inter dealings between the entities that Mr. Allen owned or controlled and wanted to see . . . if they were properly disclosed and if they were properly supervised." RP 3213.

The NAC noted that there was little regulatory pressure applied to NYPPEX for the NYPPEX Holdings bank statements. Although FINRA staff requested those statements in the February 10 Request, it did not specifically request those statements again until May 29, 2020.

There was some regulatory pressure applied to NYPPEX regarding the need for passwords to access certain files, including a file that appeared to contain information related to Allen's OBAs and PSTs. The NAC acknowledged, however, that there was confusion about which passwords were needed for which files. *See* RP 9078-79. The NAC found that the confusion over the passwords was relevant to the issue of whether NYPPEX provided a valid reason for the deficiencies related to the responses about Allen's OBAs and PSTs and its failure to provide passwords for three other PDF files. *See* RP 9078-79.

Lastly, the NAC gave NYPPEX some credit for providing a substantial amount of the documents and information requested by FINRA staff in the early months of 2019. RP 9079. With respect to the bank statements, specifically, the NAC noted that NYPPEX Holdings and NYPPEX had a total of seven bank accounts in 2019 and 2020, and NYPPEX produced more than half of the statements requested for those accounts. RP 9079.

The Commission should affirm the NAC's imposition of a one-year suspension of NYPPEX.

c. The Sanctions Will Not Impose an Unnecessary Burden on Competition

Applicants contend that these sanctions constitute "a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act." Applicants' Brief at 1-2. This argument has no merit.

The requirement that sanctions imposed by FINRA not impose an unnecessary or inappropriate burden on competition was added to the Exchange Act to enhance competition among securities exchanges and markets. *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *51 n.73 (Nov. 14, 2008). It obligates the Commission to balance the perceived anti-competitive effect of the sanction against the purposes of the Exchange Act that would be advanced by it. *See Order Approving Proposed Rule Change*, Exchange Act Release No. 173371,1980 SEC LEXIS 128, at *56-58 (Dec. 12, 1980) (SR-NASD-78-3). The economic impact of the sanction on the applicant is not considered in this analysis. *See Berger*, 2008 SEC LEXIS 3141, at *51 n.73.

There is no evidence that Allen's bar or NYPPEX's suspension will burden competition among securities exchanges and markets. Applicants argue, essentially, that they provide a service that allows investors to exit private funds and companies, and that they will not be able to provide that service, at least for some period, if Allen is barred and NYPPEX is suspended. Applicants' Brief at 1-2. Applicants, however, do not cite any record evidence showing that the sanctions would harm competition among securities exchanges and markets. Rather, Applicants only assert, in conclusory fashion, that the sanctions will "suppress an important private secondary market [i.e., NYPPEX], thereby harming customers of that market[.]" Applicants' Brief at 2. This is not evidence of a burden on competition between exchanges or markets.

Indeed, neither Allen nor NYPPEX has been registered with FINRA since December 2022.[43] Accordingly, the private secondary market already has been without their broker-dealer services for almost two years. There is no evidence that the private secondary market has been harmed by Allen's or NYPPEX's absence during this period, nor is there any evidence that it will be harmed in the future if Allen is barred and NYPPEX is suspended for one year.

On the other side of the scale, the sanctions the NAC imposed further the objectives of the Exchange Act. The "animating purpose" of the Exchange Act is to ensure honest securities markets and thereby promote investor confidence. *United States v. O'Hagan*, 521 U.S. 642, 658 (1997). FINRA Rule 8210 is consistent with this goal because it "is essential to FINRA's ability to investigate possible misconduct by its members and associated persons," and it reflects the Exchange Act's mandate that FINRA adopt rules to promote just and equitable principles of trade. *See Merrimac Corp. Secs., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, *14 (July 17, 2019). While "a Rule 8210 violation will rarely, in itself, result in direct harm to a customer," FINRA's enforcement of the rule furthers the purpose of the Exchange Act by ensuring FINRA's ability to "detect misconduct among its members and associated persons in the interest of protecting investors and the integrity of the markets." *N. Woodward*, 2015 SEC LEXIS 1867, at *47-48.

d. The Sanctions Will Protect Investors

Applicants contend the sanctions will not protect investors and therefore are punitive because Applicants "do not participate in any public markets" as NYPPEX operated "as a private secondary market" for "qualified investors," and the NAC did not find that Applicants violated

[43] *See supra* note 2.

the antifraud provisions of the Exchange Act or Securities Act. Applicants' Brief at 4. Neither argument has merit.

Applicants cite no authority holding that firms who serve the private secondary market for qualified investors do not need to comply with FINRA Rule 8210, or that they should not be sanctioned for violating it. To the contrary, the Commission has held that FINRA Rule 8210 "applies to all FINRA member firms, regardless of their specific business plans or the sophistication of their investors." *Asensio & Co.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, *13 (Dec. 20, 2012); *see also Louis Ottimo*, Exchange. Act Release No. 95141, 2022 SEC LEXIS 1578, at *17 (June 22, 2022) ("We have repeatedly held that both sophisticated and unsophisticated investors are entitled to protection against abuse under the securities laws.").

The sanctions the NAC imposed are remedial because, although violations of FINRA Rule 8210 rarely result in direct harm to investors, the rule enables FINRA to detect misconduct that can harm investors. *N. Woodward*, 2015 SEC LEXIS 1867, at *47-48. The record shows that there is a serious risk that Allen would not comply with any requests issued to him under FINRA Rule 8210 in the future, which would put investors at risk. The bar therefore will protect investors. *See Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *26 (Sept. 10, 2010) (explaining that a bar would protect investors from any further FINRA Rule 8210 violations by the applicant and encourage cooperation by others), *aff'd*, 436 F. App'x 31 (2d Cir. 2011). The one-year suspension for NYPPEX will protect investors by encouraging the firm to cooperate with future FINRA Rule 8210 requests. *See id.*

E. Applicants Are Not Entitled to a Jury Trial

Applicants argue that, under *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), the Commission cannot sustain FINRA's sanctions because this disciplinary proceeding is "a suit at common law," and under the Seventh Amendment, they were entitled to a jury trial. *See* Applicants' Brief at 7-8. Applicants' argument fails for several reasons.

First, Applicants' argument fails because they did not exhaust it before FINRA. *See, e.g., Newport Coast Secs. Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *38 (Apr. 3, 2020) ("[I]mposing an exhaustion requirement promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations."). Applicants challenge the way FINRA exercises its authority to discipline members and associated persons under the Exchange Act, rather than presenting a constitutional challenge to FINRA's structure or existence. *Cf. Axon Enter., Inc. v. FTC*, 598 U.S. 175, 189 (2023) (contrasting constitutional claims going to a federal agency's "structure or very existence" to more limited claims challenging the procedures used in a particular case); *Blankenship v. FINRA*, Civ. A. No. 24-3003, 2024 U.S. Dist. LEXIS 158376, at *6-7 (E.D. Pa. Sept. 4, 2004) (post-*Jarkesy* decision holding that a claim of a jury trial right under 7th Amendment must be raised in the FINRA disciplinary proceeding). Accordingly, Applicants forfeited this argument by not raising it before FINRA. *See Shlomo Sharbat*, Exchange Act Release No. 93757, 2021 SEC LEXIS 3647, at *16-17 & n.44 (Dec. 13, 2021) (finding that applicant waived his due process argument); *Kabani & Co.*, Exchange Act Release No. 80201, 2017 SEC LEXIS 758, at *45-46 (Mar. 10, 2017) (finding that applicant forfeited his Seventh Amendment argument).

Second, Applicants' argument fails because FINRA is not a state actor. To establish that FINRA violated their Seventh Amendment right to a jury trial, Respondents must, as "a threshold matter," demonstrate "that in denying [their] constitutional rights, [FINRA's] conduct constituted state action." *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999); *see also Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 808 (2019) ("In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities."). FINRA is a private company, and Applicants have not shown that FINRA's disciplinary action against them is "fairly attributable to the government" for the purpose of applying the requirements of the Seventh Amendment to this proceeding. *See Lugar v. Edmondson Oil. Co.*, 457 U.S. 922, 937 (1982) ("Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."); *Desiderio*, 191 F.3d at 206 (rejecting a Seventh Amendment claim because the "requisite state action" was absent); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200-02 (9th Cir.1998) (rejecting Seventh Amendment claim and observing that "[a] threshold requirement of any constitutional claim is the presence of state action"), *overruled on other grounds by EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003).

Third, Applicants' argument fails because FINRA's disciplinary proceeding is outside the scope of Article III and the Seventh Amendment. The Seventh Amendment to the Constitution states that "[i]n suits at common law, . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII. "[T]he "Seventh Amendment's jury trial right applies only in an Article III court." *See Jarkesy*, 144 S. Ct. at 2157 (Kagan, J., dissenting). The Seventh Amendment does not apply to a matter that is properly assigned to a non-Article III body for adjudication. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 345 (2018) ("[W]hen

Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.").

Applicants have not shown that FINRA's disciplinary proceeding is a suit at common law which FINRA was required to bring in an Article III court. The hallmark the Supreme Court has looked to in determining whether a matter is a suit at common law is whether it is "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Jarkesy*, 144 S. Ct. at 2132. In making this determination, the Supreme Court considers "centuries old rules" and "historic categories of adjudications" outside courts. *Id.* at 2133-34.

The Commission previously has found that FINRA disciplinary actions are not suits at common law for purposes of Article III, and therefore the Seventh Amendment does not apply to them. *See Daniel Turov*, 51 S.E.C. 235, 238 (1992) ("A disciplinary hearing before a self-regulatory organization is . . . no[t] a 'suit at common law' within the meaning of the Seventh Amendment. The guarantees pertaining to trials by jury . . . are therefore inapposite.").[44] The history of self-regulation in the securities industry is consistent with the Commission's holding. Private, self-regulatory securities organizations have, since the founding, decided for themselves whether to investigate a member for rules violations, decided whether a violation has occurred through specified procedures, and decided whether to assess fines or revoke membership because of a rule violation. *See Kim v. FINRA*, No. 1:23-cv-0240(ACR) 2023 U.S. Dist. LEXIS 180456 (D.D.C. Oct. 6, 2023). Put simply, the self-regulatory mechanisms of the securities industry

[44] *Cf. Harold T. White and Francis M. Weld*, 3 S.E.C. 466, 533 (1938) (finding that a Commission proceeding that may result in suspension or expulsion of a member or officer of national securities exchange is "analogous to a proceeding for the revocation of a license and is neither a criminal action nor a suit at law").

have never been "the stuff of the traditional actions at common law." *See Jarkesy*, 144 S. Ct. at 2133-34.

Applicants have not shown that this disciplinary proceeding, placed in the appropriate historical context, is a suit at common law. Instead, they make a sweeping assertion that this is a suit at common law because FINRA imposed "[c]ivil penalties . . . a type of remedy at common law that could only be enforced in courts of law." Applicants' Brief at 7. But Allen's bar and NYPPEX's suspension are not civil penalties. *See Saad*, 2019 SEC LEXIS 2216, at *23 ("Ordering the fox out of the henhouse, where necessary to protect the investing public and the integrity of the security industry, falls comfortably within the common understanding of the term remedial."). And the Supreme Court has held that non-Article III bodies may conduct adjudications and impose monetary sanctions without running afoul of Article III. *See, e.g.*, *Passavant v. United States*, 148 U.S. 214, 221-22 (1893); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338-40 (1909); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 449-61 (1977). Applicants have provided no reason for the Commission to depart from its precedent that FINRA disciplinary proceedings are not suits at common law subject to the Seventh Amendment.

Lastly, Applicants' argument fails because they voluntarily agreed to participate in this proceeding, and thus they have relinquished any right they might have to a jury trial in federal court. *See CFTC v. Schor*, 478 U.S. 833, 848 (1986) (Article-III and jury-trial rights are "subject to waiver, just as are other personal constitutional rights").

F. FINRA's Adjudication Did Not Violate the Due Process Clause

Applicants argue that the Commission cannot sustain the sanctions FINRA imposed for Allen's and NYPPEX's violations of FINRA Rule 8210 "as a matter of administrative law."

Applicants' Brief at 8-9. Applicants contend that, because courts have held that the due process clause of the Fifth Amendment prohibits federal agencies from enforcing administrative subpoenas in their own forums, the Commission could not lawfully delegate to FINRA authority to adjudicate FINRA Rule 8210 violations in its forum. *Id.* at 8. According to Applicants, the Commission's "[a]ffirmance of FINRA's use . . . of such powers would violate the doctrine of delegation and the Due Process clause of the Fifth Amendment[.]" *Id.* at 9.

Applicants' argument fails because Congress, not the Commission, delegated to FINRA the power to enact and enforce FINRA Rule 8210. *See DL Cap. Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 95 (2d Cir. 2005) ("As an SRO, the NASD is . . . authorized by Congress to promulgate and enforce rules governing the conduct of its members."). Applicants have not shown that Congress's delegation to FINRA was unlawful. And, as discussed above, FINRA is a private entity rather than a state actor, and therefore the Constitution's due process requirements do not apply in its disciplinary proceedings. *Berger v. SEC*, 347 F. App'x 692, 694 (2d Cir. 2009) ("NASD is not a state actor subject to due process requirements[.]"); *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 SEC LEXIS 837, at *20 n.40 (Mar. 19, 2013) ("SROs such as FINRA are not state actors and thus not subject to the Constitution's due process requirements.").[45]

[45] Applicants contend the Commission's precedent on this issue "is no longer subject to deference due to the Supreme Court's decision in *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244 (2024). Applicants do not explain how *Loper Bright* is relevant to Congress' statutory delegation of authority to FINRA, or to judicial decisions holding that FINRA is not a state actor subject to the Fifth Amendment's due process requirements. And, moreover, *Loper Bright* "does not call into question prior cases that relied on the *Chevron* framework." *Id.* at 2253.

V. CONCLUSION

The NAC's findings of violation are supported by the record. Allen associated with NYPPEX while he was statutorily disqualified, and NYPPEX allowed him to do so, in violation of FINRA's By-Laws and rules. The Press Release improperly implied FINRA's endorsement of NYPPEX's business practices, in violation of FINRA Rule 2210. And Allen and NYPPEX failed to respond completely to FINRA staff's requests for documents and information, in violation of FINRA Rule 8210. The sanctions the NAC imposed for these violations are not excessive or oppressive, nor will they impose an undue burden on competition. Accordingly, the Commission should sustain the NAC's decision in all respects and dismiss the application for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that this Brief in Opposition to the Application for Review (File No. 3-21933) complies with the length limitations set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,624 words.

I further certify that I have complied with the Commission's Rules of Practice by filing a brief that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 6th day of September 2024, I caused a copy of FINRA's Brief in Opposition to the Application for Review, in the *Matter of Application for Review of NYPPEX, LLC and Laurence Allen*, Administrative Proceeding File No. 3-21933, to be filed through the SEC's eFAP system and served by electronic mail on:

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